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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 772

SAMSON EISNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	PAGE
Statement of Jurisdictional Grounds	1
Questions Presented	2
Applicable Constitutional Provisions, Statutes and Rules	2
Statement of Case	4
Argument	6
I	7
II	11
III	12
Conclusion	15

APPENDIX

A. Order Granting Extension to Petition for Certiorari	1a
B. United States Code, Section 2315, Title 18	1a
C. Federal Rules of Criminal Procedure, Rule 41	2a

TABLE OF CASES

Davis v. United States, 328 U. S. 582, 592-593	14
Gouled v. United States, 255 U. S. 298	11
Harris v. United States, 331 U. S. 145	14
Jones v. United States, 362 U. S. 257	9
Marron v. United States, 275 U. S. 192	13
Nathanson v. United States, 290 U. S. 41	8
Segurola v. United States, 275 U. S. 106	11
Steele v. United States, No. 1, 267 U. S. 498, 501	9

PAGE

Weeks v. United States, 232 U. S. 383 11

Zap v. United States, 328 U. S. 624, 629 14

TABLE OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Constitution of the United States, Fourth Amendment 3, 7, 8, 11

Constitution of the United States, Fifth Amendment 3, 7, 11, 12

United States Code, Section 2315, Title 18 ..... 2, 6

Federal Criminal Procedure Rule 41 ..... 3, 8, 11

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The opinion of the Court of Appeals for the Sixth Circuit was delivered January 10, 1962, in case styled *United States of America, Plaintiff-Appellee v. Samson Eisner, Defendant-Appellant*, and numbered 14,621. A copy of said opinion is contained in the record as printed for the use of the court below and filed herewith (R. 194a-197a).

STATEMENT OF JURISDICTIONAL GROUNDS

Samson Eisner prays that a writ of certiorari issue to review an important question of Federal Law decided by

the United States Court of Appeals for the Sixth Circuit in conflict with applicable decisions of this court; to review the question of the search and seizure involved herein which contravened the Fourth Amendment of the Constitution of the United States, and to review the question of the use of the items seized in evidence which vitiated petitioner's conviction in that such use was in contravention of the Fifth Amendment of the Constitution of the United States. The judgment sought to be reviewed is dated and was entered on January 10, 1962 (R. 193a). The Honorable Potter Stewart, Associate Justice of this court, on February 9, 1962, granted an extension of time within which to petition for certiorari herein, to and including March 6, 1962 (Appendix . .). Section 1254 (1), Title 28, United States Code, confers jurisdiction on this court to review the judgment in question by writ of certiorari. The defendant was charged with a violation of Section 2315, Title 18, United States Code, which conferred jurisdiction on the trial court.

QUESTIONS PRESENTED

The questions presented are:

1. Did the affidavit for the search warrant involved herein contain sufficient facts to justify the United States Commissioner's finding that probable cause existed that a law of the United States was being violated?

2. Could property not described in the search warrant be seized and used in evidence?

APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The petitioner was indicted for a violation of Section 2315, Title 18, United States Code. The material portion thereof, in words and figures, is as follows:

> "Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities or money of the value of $5,000.00 or more . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted or taken;
>
> "Shall be fined not more than $10,000.00 or imprisoned not more than ten years or both."

The full text of said statute is set forth in the Appendix hereof at Page . . .

The Fourth Amendment of the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment of the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamouse crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41 of the Criminal Procedure for the United States District Courts is set forth in the Appendix hereto at Page . . . .

STATEMENT OF CASE

The petitioner was arrested for a violation of Section 2315, Title 18, of the United States Code, by a special agent of the Federal Bureau of Investigation, in Bowling Green, Kentucky, on September 7, 1960, after his automobile was searched pursuant to a search warrant issued by the United States Commissioner at Bowling Green, Kentucky. There was seized, as a result of the search, certain fur pieces which had been stolen from the Wermuth Fur Company, Sioux Falls, South Dakota, on August 29, 1960. On the day of the arrest, or the day before, the Federal Bureau of Investigation received information from an undisclosed confidential source that petitioner was registered at the Gateway Motel, in Covington, Kentucky, some 224 miles northeast of Bowling Green, Kentucky, and that he had in his possession certain fur pieces stolen from the Davidson Indiana Fur Company, Indianapolis, Indiana (R. 117a-118a). The Federal Bureau of Investigation, on the morning of the arrest, put the petitioner under surveillance and, when he departed the motel in his automobile, he was followed by agents of the Federal Bureau of Investigation to Bowling Green, Kentucky. Kentucky State Police and the City Police of Bowling Green, Kentucky, were notified of petitioner's destination, possible route and that they should be on the alert to arrest petitioner if he violated any state or local laws. These state and local police officers were also instructed by the Federal Bureau of Investigation to inform them if they apprehended petitioner and discovered any stolen merchandise in his possession (R. 115a-116a). At Bowling Green, Kentucky, a City Detective, accompanied by a special agent of the Federal Bureau of Investigation, stopped petitioner in his automobile, at or about 2:30 o'clock P. M. (R. 83a), and took him to the local police station, where he remained until approximately 4:20 o'clock P. M. (R. 111a). Peti-

tioner was then taken before the United States Commissioner in Bowling Green, Kentucky, where he was held until approximately 5:56 o'clock P. M. (R. 125a), at which time he was taken to his automobile, where a search warrant, previously issued by the Commissioner, was executed by the agent by searching petitioner's automobile. The aforementioned Wermuth fur pieces were seized. No Davidson's fur pieces were found (R. 118a-119a). At the time of the search and seizure, the agent who executed the affidavit for the search warrant and who conducted the search, had no knowledge that the Wermuth fur pieces had been stolen (R. 118a).

The affidavit for the search warrant (R. 16a), signed by Special Agent Mark Wallace, a resident agent of the Federal Bureau of Investigation stationed at Bowling Green, Kentucky, upon which the United States Commissioner found sufficient probable cause to exist to justify the issuance of the search warrant, is in words and figures as follows:

> "That he (has reason to believe) that (on the premises known as) one 1960 Oldsmobile Convertible Automobile, Ohio License Registration for 1960 7942GG, Ser. No. 609 M 16689, in the Western District of Kentucky, there is now being concealed certain property, namely stolen merchandise, to-wit: Furs which are a part of the loot taken in a break-in at the Davidson Fur Company Inc., Glendal Center, Indianapolis, Ind. and which are believed to be in the automobile described above which are Title 18, Section 2315.
>
> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: S. A. John McCardle, FBI, Indianapolis, Ind., has information that a break in and theft occurred at Davidson Indiana Fur Co., Glendal Center, Indianapolis, Ind., on Sept. 4, 1960, in the course of which fur garments of the approximate value of $120,000.00 were taken. I have received information

through official channels from Agt. John McCardle about this breakin. Information has been obtained by S. A. Clifford Anderson, FBI, Cincinnati, Ohio which he believes to be reliable to the effect that Sam Eisner received furs which were a part of the loot from the Davidson Indiana Fur Co.; in Ky., after they had been transported from Indianapolis, and had knowledge that they had been stolen."

Subsequently, the petitioner was indicted by a United States Grand Jury for the Western District of Kentucky, convened at Louisville, Kentucky, in a one count indictment for a violation of Section 2315, Title 18, United States Code (R. 12a-13a).

Prior to the trial on this indictment, the petitioner filed a Petition to Suppress Evidence, with exhibits (R. 14a-18a), and affidavit of petitioner in support thereof (R. 18a-21a). *No response nor counter-affidavit was filed by the government and no parol evidence was offered upon the Petition to Suppress.* The District Court had before it *only* the affidavit of Special Agent Mark Wallace, upon which the search warrant was issued, the Petition to Suppress and petitioner's affidavit in support thereof. The Court then heard arguments of counsel and denied the Petition to Suppress (R. 22a-23a).

The Wermuth fur pieces seized were introduced at the trial over the objections of petitioner. The petitioner was convicted, sentenced to 5 years and fined $1,500.00 (R. 186a).

Upon appeal to the Court of Appeals for the Sixth Circuit, the judgment of the District Court was affirmed (R. 193a).

ARGUMENT

The questions here involved were decided by the United States Court of Appeals for the Sixth Circuit in conflict with applicable decisions of this court; the search and

seizure involved herein contravened the Fourth Amendment of the Constitution of the United States and therefore, the use of the items seized in evidence vitiated petitioner's conviction in that such use was in contravention of the Fifth Amendment of the Constitution of the United States.

The issues are very narrow in scope and were so narrowed by the Trial Court and the Appellate Court.

I

The Trial Court, in denying the Petition to Suppress (R. 35a) said:

> "I don't think there is any doubt about it being a valid search. . . . I must conclude that it is a valid search warrant, *based on information which is set forth in the affidavit of the agent on which we have to rely.*" (Emphasis added.)

The Court of Appeals, in its opinion (R. 194a-195a) said:

> "With respect to the issuance of the warrant, we are of the opinion that the affidavit stated facts from which the Commissioner could find probable cause for believing that the laws of the United States were being violated. (Rule and case cited.)
>
> "Nor was the affidavit insufficient because the statement of facts therein was based on hearsay instead of on the affiant's personal observation and knowledge. (Cases cited.) *In our opinion, a substantial basis for crediting the hearsay was presented.*" (Emphasis added.)

The affidavit of Special Agent Mark Wallace, to which both courts are referring, contains *only* hearsay and *no* basis for crediting the hearsay. Additionally, the hearsay, insofar as it relates to Special Agent Wallace, the agent making the oath, is at least third handed. In his affidavit, he said (R. 16a):

> "S. A. John McCardle, FBI, Indianapolis, Ind., has information that a break in and theft occurred at Davidson Indiana Fur Co. . . . I have received information through official channels from Agt. John McCardle about this breakin."

and

> "Information has been obtained by S. A. Clifford Anderson, FBI, Cincinnati, Ohio . . . to the effect that Sam Eisner received furs . . . from the Davidson Indiana Fur Co., in Ky., . . ."

In his testimony, Special Agent Wallace said he received this last quoted information from his Louisville office and that he never talked to Special Agent Anderson of Cincinnati (R. 117a).

The only attempt to "credit" the hearsay of the informant in the affidavit was the statement (R. 16a):

> ". . . which he (S. A. Anderson), believes to be reliable. . . ."

Rule 41 of the Rules of Criminal Procedure states (Appendix):

> "A warrant shall issue only on affidavit sworn to before the judge or commissioner and *establishing the grounds* for issuing the warrant." (Emphasis added.)

The Fourth Amendment of the Constitution of the United States provides that:

> ". . . no Warrants shall issue, but upon probable cause, *supported by Oath* or affirmation. . . ." (Emphasis added.)

The affidavit for the search warrant is insufficient to establish probable cause for it merely states affiant's belief that there is a cause to search, without stating facts upon which that belief is based. See *Nathanson* v. *United*

States, 290 U. S. 41. This is also true of an affidavit which contains only hearsay. However, an affidavit containing *solely* information received from an informant, must also state, upon the officer's oath, *that the informant had previously given accurate information, that the informant's story was corroborated and that the accused was known, by the officer, to have a propensity for committing the type of violation of which he was then suspected.* See *Jones* v. *United States*, 362 U. S. 257. The Court of Appeals for the Sixth Circuit cited the *Jones* case, supra, in their opinion (R. 195a) and stated:

> "In our opinion, a substantial basis for crediting the hearsay was presented."

We ask, where was it presented? That quote from *Jones* v. *United States*, supra, was taken out of context from this court's opinion. A thorough reading of that opinion indicates without a doubt, that the "crediting" testimony must be contained in the affidavit submitted to the Commissioner prior to the issuance of the search warrant. See also *Steele* v. *United States*, No. 1, 267 U. S. 498, 501, wherein this court said:

> "The judge or commissioner must before issuing the warrant examine on oath the complainant and any witness he may produce, and require their affidavits or take the depositions in writing and cause them to be subscribed by the parties making them. *The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.*"

The affidavit of Special Agent Mark Wallace, the only evidence submitted of record to the Commissioner, *contains no statement that the officer's informant had previously given accurate information or any previous information, no statement that the informant's story was corroborated*

by other sources of information or otherwise and no statement that the petitioner had a record or reputation for dealing in stolen goods. In fact, there was no statement in the affidavit that he had ever been involved in any type of law violation.

In *Jones* v. *United States*, supra, this court said:

> "Thus we may assume that Didone had the day before been told, by one who claimed to have bought narcotics there, that petitioner was selling narcotics in the apartment. *Had that been all, it might not have been enough;*" (Emphasis added.)

That quotation contains the *conclusion* that petitioner there, was selling narcoties, bolstered by the *fact* that the informant had purchased narcotics from the petitioner. Here, however, we have only *the conclusion* of an informant that petitioner had received certain stolen furs, with *no facts* upon which to base the conclusion. Additionally, here there was no corroboration of the informant's story. In the *Jones* case, supra, this court continued:

> ". . . but Didone swore to a basis for accepting the informant's story. The informant had previously given accurate information. His story was corroborated by other sources of information. And petitioner was known by the police to be a user of narcotics. Corroboration through other sources of information reduced the chances of a reckless or prevaricating tale; that petitioner was a known user of narcotics made the charge against him much less subject to skepticism than would be such a charge against one without such a history."

This court found, in the *Jones* case, supra, that there was substantial basis for the Commissioner to conclude that narcotics were probably present in the apartment and that there was a substantial basis for crediting the hearsay contained in the affidavit. Here, there is *no* substantial

basis for the Commissioner to conclude that petitioner had stolen furs in his automobile in Bowling Green, Kentucky, and no basis for crediting the hearsay complained of.

The *Jones* case, supra, contains clear authority for the Appellate Court below to have reversed the Trial Court for its refusal to sustain petitioner's Petition to Suppress. The affidavit just did not contain *any basis* for crediting the hearsay.

We submit that the search warrant does not contain sufficient to have justified the issuance of the search warrant; that the search and seizure was unlawful and in contravention of the Fourth Amendment of the United States Constitution and Rule 41 of the Rules of Criminal Procedure; that petitioner's rights, protected by the Fourth and Fifth Amendments of the Constitution of the United States, were violated; that the Court of Appeals for the Sixth Circuit decided the case below in conflict with this court's decision in *Jones* v. *United States*, supra, and other applicable decisions.

II

The Fourth Amendment to the Constitution of the United States stands as the citizen's guarantee that he shall be secure in person and property against unreasonable search and seizure. In *Weeks* v. *United States*, 232 U. S. 383, this court held that evidence obtained through an illegal search and seizure was inadmissible in a federal prosecution. The petitioner brought in issue in the Trial Court before trial, the circumstances surrounding the search and seizure by filing his Petition to Suppress the evidence. *Segurola* v. *United States*, 275 U. S. 106; *Gouled* v. *United States*, 255 U. S. 298; Rule 41 F. R. Crim. P.

Closely allied with the right to protection from an unlawful search and seizure, propounded by the Fourth Amendment to the Constitution of the United States, is the right

to refuse to give incriminating evidence against one's self, guaranteed by the Fifth Amendment of the Constitution of the United States. Here, the petitioner objected to the introduction of the property seized at the time it was offered in evidence at the trial and if it was seized illegally, it should not have been introduced as evidence against him.

III

The second question presented by petitioner involves the right of the federal agent to seize property not described in the search warrant and the right of the government to introduce this property in evidence over the objection of petitioner (R. 81a).

The property is described in the search warrant as (R. 17a):

> ". . . furs which are a part of the loot taken in a breakin at the Davidson Fur Company, Inc., Glendal Center, Indianapolis, Indiana. . . ."

No other description was included in the search warrant. There was no Davidson furs seized from petitioner. The following question was propounded to and answered by Special Agent Wallace (R. 118a):

> "Q. Well, as it developed when you searched the automobile, you didn't find any furs from the Davidson Indiana Fur Company, did you? A. As it developed, that is correct."

All of the furs found in petitioner's automobile, with the exception of two, had tags containing the words "Wermuth Furs" and a description of the fur piece with numbers and a dollar figure (R. 19a). The two untagged pieces and all of the tagged pieces were identified by Mr. Lennen, part owner of Wermuth Fur Company, as Wermuth Furs. It is undisputed that the furs described in the search warrant

were "Davidson furs" and that the furs seized were "Wermuth furs."

The Appellate Court below dismissed this question on appeal with these words in its opinion (R. 196a).

> "Disregarding for the moment what was taken in the search, we are of the opinion that although the affidavit upon which the search warrant was issued referred to furs stolen from the Davidson Indiana Fur Company of Indianapolis, Indiana, and such furs were not found in the automobile, this fact did not invalidate the search warrant or the search."

That court quoted a portion of Rule 41 (e), Rules of Criminal Procedure, and *Marron v. United States*, 275 U. S. 192. With both quotations we agree. This is the law as enunciated by this court. The Court of Appeals below, in its opinion (R. 196a), said:

> "*Rule 41 (e) Rules of Criminal Procedure*, provides for the return of the property seized to the party aggrieved and to suppress its use as evidence on the ground that 'the property seized is not that described in the warrant.' In *Marron* v. *United States*, 275 U. S. 192, at p. 196, the Supreme Court said, '*The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*' See: *Steele* v. *United States*, No. 1, 267 U. S. 498, 501." (Emphasis added.)

In *Steele* v. *United States*, supra, this court said:

> "If it appears that the property taken is not the same as that described in the warrant, . . ., the judge or commissioner must cause the property to be restored to the person from whom it was taken;"

The Appellate Court below then went on in its opinion, calling attention to an apparent exception [illegible]

rule recognized by this court in cases where the officer, during a valid search, discovers that another crime is being committed. It cited *Harris* v. *United States*, 331 U. S. 145, which held that an agent making a valid search may seize property found on the premises which is the subject matter of a different crime. In the *Harris* case, supra, the things seized were Notice of Classification cards and registration certificates which were the property of the United States and unlawfully in possession of Harris. Here, the property seized was not the property of the United States Government, but fur pieces owned by a private company. According to the record, Special Agent Wallace did not, at the time of the search and seizure, know the Wermuth furs seized to be "the subject matter of a different crime." He did not know, at that time, that the Wermuth furs, or anything else, had been stolen from the Wermuth Fur Company. Even at the time the Trial Court below overruled petitioner's Petition to Suppress this evidence, it had before it no evidence that the Wermuth furs were stolen furs or even that the Davidson furs had been stolen. At that time, all the Trial Court had before it were the search warrant, affidavit for the search warrant, petitioner's Petition to Suppress and his affidavit in support thereof. This is undisputed. Could the Trial Court conclude, from that evidence, that the property seized was in fact "the subject matter of a different crime" or of any crime?

The Appellate Court below cited only two other decisions of this court to support its opinion in this respect, *Davis* v. *United States*, 328 U. S. 582, 592-593, and *Zap* v. *United States*, 328 U. S. 624, 629.

In the *Davis* case, supra, the property seized was public property. At page 589, this court said:

> "We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen."

The *Zap* case, supra, involved the seizure of a check from a person doing work under a government cost-plus contract, under which the petitioner there agreed to permit inspection of his accounts and records.

Neither of those cases can be construed to be authority for the opinion of the Appellate Court below. Accordingly, the property seized, not being the property described in the search warrant and the Trial Court having no knowledge that the property seized was stolen property, at the time it ruled on petitioner's Petition to Suppress, should have been suppressed as evidence at the petitioner's trial.

CONCLUSION

Petitioner has raised herein important questions in the administration of criminal justice in the United States Courts and for the reasons set out in this petition, petitioner respectfully prays that certiorari be granted.

Respectfully submitted,

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